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No. 88-1988

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

MORTON M. LAPIDES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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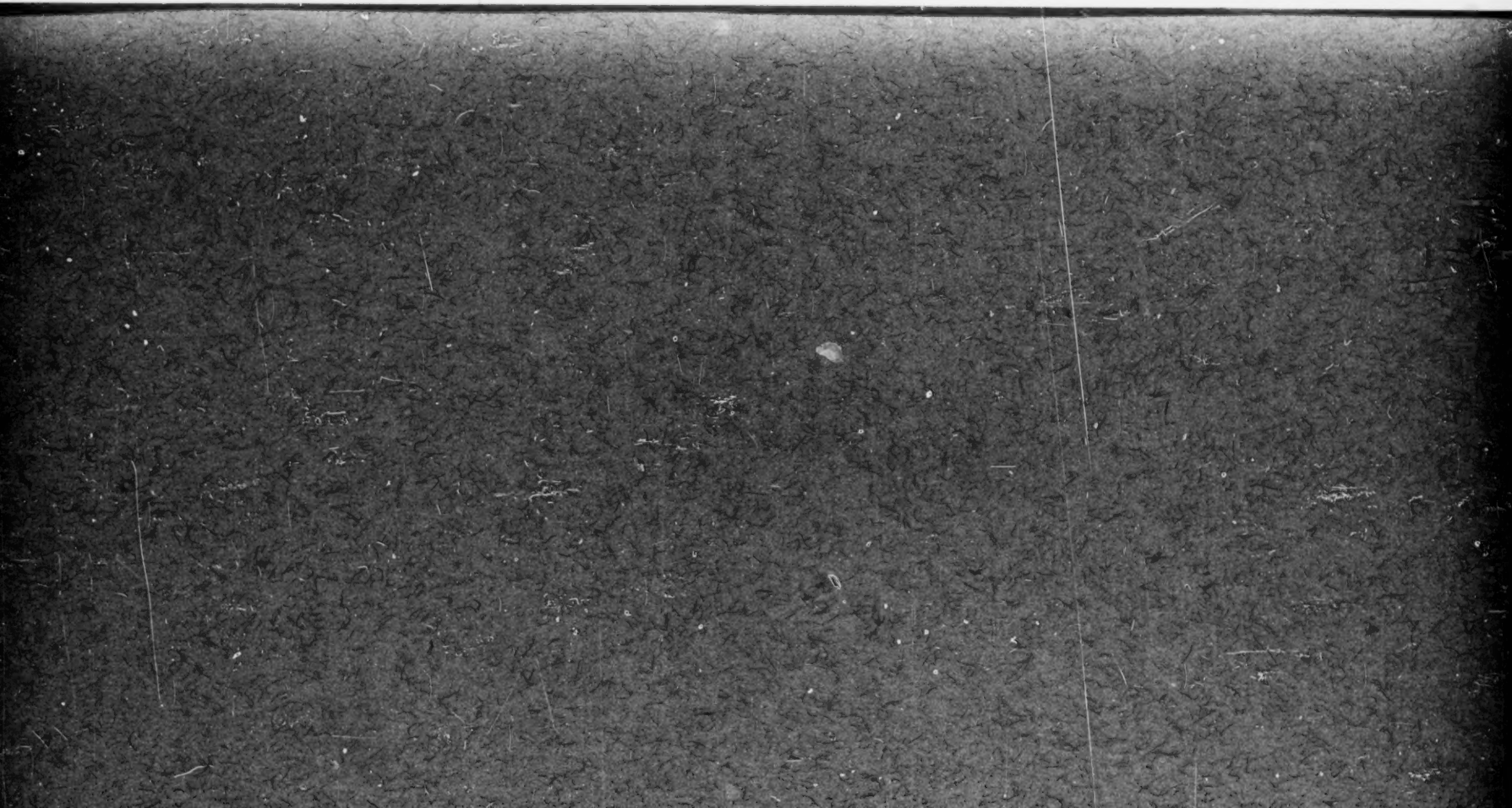

QUESTIONS PRESENTED

1. Whether a court of appeals may affirm a conviction in an unpublished per curiam opinion that does not discuss in detail all of the contentions raised on appeal.

2. Whether there was sufficient evidence to support petitioner's conviction.

3. Whether the trial court improperly commented on the credibility of a government witness.

4. Whether petitioner was improperly convicted on a vicarious liability theory.

5. Whether the government suppressed exculpatory evidence at trial.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	4
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Furman v. *United States*, 720 F.2d 263 (2d Cir. 1983)	4
Green v. *Bock Laundry Machine Co.*, 109 S. Ct. 1981 (1989)	5
Hamling v. *United States*, 418 U.S. 87 (1974)	6
NLRB v. *Amalgamated Clothing Workers, Local 990*, 430 F.2d 966 (5th Cir. 1970)	5
Quercia v. *United States*, 289 U.S. 466 (1933)	9
Stirone v. *United States*, 361 U.S. 212 (1960)	10
Superintendent v. *Hill*, 472 U.S. 445 (1985)	6
Taylor v. *McKeithen*, 407 U.S. 191 (1972)	5
United States v. *Bagley*, 473 U.S. 667 (1985)	11
United States v. *Baynes*, 548 F.2d 481 (3d Cir. 1977)	4-5
United States v. *Dunmore*, 446 F.2d 1214 (8th Cir. 1971), cert. denied, 404 U.S. 1041 (1972)	9
United States v. *Gravely*, 840 F.2d 1156 (4th Cir. 1988)	12
United States v. *Johnston*, 268 U.S. 220 (1925)	6
United States v. *McPartlin*, 595 F.2d 1321 (7th Cir.), cert. denied, 444 U.S. 833 (1979)	11
United States v. *Safley*, 408 F.2d 603 (4th Cir.), cert. denied, 395 U.S. 983 (1969)	9

Statutes and rule:

Sherman Act § 1, 15 U.S.C. 1	2
18 U.S.C. 3143	3
28 U.S.C. 1291	4
Fed. R. Crim. P. 52	8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported, but the decision is noted at 870 F.2d 656 (Table). The opinion of the district court (Pet. App. 9a-49a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1989. A petition for rehearing was denied on April 7, 1989. The petition for a writ of certiorari was filed on June 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 14, 1987, a grand jury sitting in the Eastern District of Virginia returned a one-count indictment against the Allegheny Bottling Company (Pepsi) and three individuals: James Harford, Odis Allen, and petitioner Morton Lapides. The indictment charged that the defendants had conspired to fix prices for soft drinks sold by Pepsi and its chief competitor, Mid-Atlantic Coca-Cola Bottling Company, Inc. (Coke) between 1982 and 1985, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Allen, a regional manager of Coke, pleaded guilty. The remaining defendants were convicted following a seven-week jury trial. Petitioner, the chairman of Pepsi, was fined $100,000 and was sentenced to three years' imprisonment, all but 179 days of which were suspended on the condition that he perform three years of community service.[1] The court of appeals affirmed the convictions, but modified the sentence of co-defendant Pepsi.

1. The trial evidence showed that officers of Pepsi and Coke met between 1982 and 1985 and agreed to adhere to the prices published in their promotional letters. This

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[1] Petitioner has since completed his sentence of imprisonment. In a separate action, petitioner sought a stay of his community service obligation pending the disposition of his certiorari petition in this case. The district court denied a stay, and the court of appeals denied a stay pending appeal.

agreement in effect set the price for Coke and Pepsi in the Mid-Atlantic region covering Baltimore, Norfolk, and Richmond. Pet. App. 4a-5a, 11a-12a.

Petitioner launched the conspiracy in 1982. He directed his vice-president in charge of sales, Jerry Pollino, to meet with Coke president James Harford at an upcoming soft drink convention in Ocean City, Maryland, to advise him that Coke had been discounting its products too heavily and that the practice should stop. Pet. App. 6a, 15a. Pollino and Harford, who had previously worked together at Canada Dry, met and agreed to stop the discounting by adhering to the prices published in their promotional letters. *Id.* at 5a, 16a. Thereafter, Pollino, Sheridan, and Harford met periodically to reaffirm their commitment to the price-fixing agreement, and their regional managers carried out the conspiracy at the local levels. *Id.* at 5a, 12a-13a.

Several officers and employees of Pepsi and Coke admitted that they participated in the conspiracy. Pet. App. 5a. Pollino kept Sheridan informed of the progress of the conspiracy in the various regions; Sheridan, in turn, kept petitioner informed. *Id.* at 6a, 16a. Petitioner directed Sheridan to be sure that the agreement was kept in force. *Id.* at 17a.

2. The court of appeals expedited the appeal because petitioner was denied bail pending appeal.[2] A month after hearing oral argument, the court unanimously affirmed the convictions of petitioner and his co-defendants. In a per curiam opinion, the court discussed the evidence supporting the charges and explained its reasons for rejecting the nu-

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[2] The district court held that petitioner had not met his burden under 18 U.S.C. 3143 of establishing that he was not likely to flee the country while the appeal was pending. The court of appeals affirmed the denial of bail.

merous claims raised by the appellants. Among other things, the court found that "a convincing case of price fixing was presented by the prosecution and believed by the jury," Pet. App. 5a, and that petitioner had initiated the conspiracy, *id.* at 6a. The court expressly rejected petitioner's contention that he had been convicted on a theory of "vicarious liability"; rather, the court found that the evidence was sufficient to convict petitioner for "what he did, what he said, and the orders he gave his employees in furtherance of the conspiracy." *Ibid.* Finally, the court concluded that there was no evidence to support petitioner's "claim of bias or improper conduct on the part of the trial judge" and that the jury had been properly instructed. *Id.* at 7a.

ARGUMENT

1. Petitioner first claims that it was improper for the court of appeals to affirm his conviction in an unpublished per curiam opinion. He asks this Court to grant review to establish uniform standards (the content of which petitioner does not suggest) governing the issuance of published opinions. Pet. 10. That claim supplies no basis for reviewing, much less reversing, the judgment below.

The right to appeal provided a defendant by 28 U.S.C. 1291 entitles him to an independent review of the district court's judgment by the court of appeals. Petitioner received precisely that. The right to an appeal does not also encompass the right to an opinion treating each of the defendant's claims separately and in detail. "The fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983). See also *United States* v. *Baynes*, 548

F.2d 481 (3d Cir. 1977); *NLRB* v. *Amalgamated Clothing Workers, Local 990*, 430 F.2d 966, 971 (5th Cir. 1970). Requiring the courts of appeals to publish an opinion in every case would impose a significant and needless burden on the courts and the profession, especially because (as petitioner's appeal illustrates) many appeals are frivolous or have little merit, involve nothing more than the application of settled law to the facts, or follow an opinion by the district court fully addressing the issues raised on appeal. Moreover, issuing an unpublished opinion does not allow the circuits to avoid "accountability" (Pet. 8), because a defendant has the opportunity to develop the issues raised before the court of appeals in a petition for a writ of certiorari, and this Court can decide based on that petition whether review is warranted. *E.g.*, *Green* v. *Bock Laundry Machine Co.*, 109 S. Ct. 1981 (1989). For those reasons, this Court has recognized that "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972).

Finally, the court of appeals did not treat petitioner's appeal "summarily," as he claims. Pet. 5 n.4. The court acted expeditiously to decide the appeal because petitioner had been denied bail, but the court had the benefit of full briefing and argument before issuing its decision, a 10-page opinion discussing in appropriate detail the evidence against the defendants and the principal issues raised.[3]

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[3] The case was argued on December 6, 1988, and the court of appeals issued its opinion on January 11, 1989. The defendants had been permitted to file one joint brief raising about a dozen issues for appeal, and the three individual defendants were permitted to file separate briefs that raised a dozen more issues. The court also permitted two additional parties to file briefs addressing an issue regarding corporate sentencing. The court of appeals' opinion addressed practically every

2. Petitioner's claim that the evidence was insufficient to support his conviction (Pet. 10-12) does not warrant review by this Court. See *Hamling* v. *United States*, 418 U.S. 87, 124 (1974) ("The primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."); accord *Superintendent* v. *Hill*, 472 U.S. 445, 460-461 (1985) (Stevens, J., concurring in part and dissenting in part). In any event, petitioner's contention is based on the erroneous assertion that his conviction rested on the "contradictory" testimony of two government witnesses on a "pivotal factual issue." Pet. 10. In fact, the government's two principal witnesses, Pepsi president James Sheridan and Pepsi vice-president Jerry Pollino, both implicated petitioner in the price-fixing conspiracy. Sheridan and Pollino, who were subordinates of petitioner, testified that petitioner knew in 1982 that Pollino was going to meet with Coke's President James Harford at an upcoming Ocean City convention to discuss pricing. Pet. App. 15a-16a; C.A. App. 919-920 (Sheridan), 2527-2531, 2567, 2569 (Pollino). Both Sheridan and Pollino testified – as did several other Coke and Pepsi employees – that this initial meeting was followed by other price-fixing meetings and discussions over the next two years. Pet. App. 16a, 32a-33a. Both Sheridan and Pollino testified that petitioner knew about the conspiracy. Pet. App. 15a-16a; C.A. App. 958, 1005-1006,

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issue raised, and, in any event, there is no rule of law that requires a court of appeals to note and address each separate issue raised by an appellant regardless of its merit.

1056 (Sheridan), 2566-2567, 3366-3368 (Pollino).[4] Finally, Pollino did not contradict Sheridan's testimony that petitioner was regularly informed of the progress of the conspiracy and directed Sheridan to make sure that Pepsi and Coke adhered to their agreement. Pet. App. 16a-17a. Unlike Sheridan, Pollino did not deal directly with petitioner on a daily basis and therefore was not in a position to know the details of the manner in which petitioner kept track of the activities of the other conspirators. Thus, even if petitioner were correct in suggesting that a conviction cannot stand where two different government witnesses present contradictory evidence on the issue of defendant's guilt – a proposition that does not have support in the cases petitioner cites (Pet. 11)[5] – that proposition would have no relevance to this case.

3. The fact that the trial judge on two occasions stated that James Sheridan was "not on trial here" does not warrant review by this Court.[6]

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[4] Sheridan testified that petitioner initiated the conspiracy by directing Sheridan to have Pollino meet with Harford. C.A. App. 923. Pollino testified that Sheridan told him to meet with Harford, but Pollino conceded that he did not know from whom that suggestion originated. C.A. App. 3005-3006; see Pet. App. 15a & n.5, 16a. Their testimony on that point is therefore not contradictory, but even if it were, the issue is not critical to establishing petitioner's guilt. Petitioner was guilty of price-fixing whether or not he initiated the first price-fixing meeting, because Pollino as well as Sheridan testified that petitioner knowingly endorsed it. *E.g.*, C.A. App. 2532 (Pollino).

[5] The cases on which petitioner relies involve equivocal testimony by a single witness on a material fact. In this case, by contrast, Sheridan's testimony was not equivocal or internally inconsistent. Moreover, Pollino's testimony corroborates Sheridan's testimony on all the essential facts necessary to prove petitioner's involvement in the conspiracy.

[6] As noted above, petitioner's claim that Sheridan was the "only" witness against petitioner (Pet. 12) is incorrect. Pollino directly impli-

The court first made that comment during the defense cross-examination of Sheridan, and defense counsel did not object to the comment. C.A. App. 1552. Because the comment was not plain error, Fed. R. Crim. P. 52, petitioner cannot now raise it as a ground for reversal.[7] Forty days later, at the close of trial, the court charged the jury that the testimony of immunized witnesses should be received "with great caution and weigh[ed] carefully." C.A. App. 7936. The court then stated that "certain witnesses were not on trial here. Mr. Sheridan was not on trial in this case." *Ibid.* Immediately after making that comment, the court emphasized that "it is only a comment. You may disregard this comment entirely." C.A. App. 7936-7937; see also *id.* at 7924, 7925. The court further stated that its opinion as to the facts did not "count in any way in this case," C.A. App. 7926, and that the jurors "are the sole judges of the credibility or believability of the witnesses." C.A. App. 7931. Under these circumstances, the court's comments were within its discretion to comment on the evidence, see

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cated petitioner in the conspiracy as well.

[7] The comment was made after Sheridan repeatedly was asked on cross-examination whether he had destroyed documents and obstructed justice (C.A. App. 1180-1184, 1549-1551) -- a crime with which Sheridan (who had pleaded guilty to the conspiracy) had never been charged. To ensure that the focus of the proceeding remained on the central issues of the case and was not unduly weighted with collateral matters, the court correctly commented that Sheridan "is not on trial here." C.A. App. 1552; see Pet. App. 31a. Even then, the court permitted the defendants to ask Sheridan twice again, in continued efforts to impeach him, whether he had destroyed documents. C.A. App. 1559-1563, 1815-1816. (No evidence that Sheridan had destroyed documents was ever presented.)

Quercia v. *United States*, 289 U.S. 466, 469 (1933), and did not prejudice petitioner.[8]

4. Petitioner's claim (Pet. 14-17) that he was improperly convicted on a "vicarious liability" theory rests on a mischaracterization of the record and was properly rejected by the court of appeals as having no merit. Pet. App. 6a; see also *id.* at 23a-25a. In the first place, the government correctly argued to the jury that petitioner joined the conspiracy by directing Pollino to meet with Harford to fix prices, by authorizing, encouraging, and condoning his subordinates' price-fixing activities, and by failing to take action to stop the price-fixing when he clearly had the power to do so. C.A. App. 7556; see Pet. App. 25a. The government did not argue, as petitioner suggests, that petitioner "could be convicted if he knew that price fixing activities were going on and failed to put a stop to them." Pet. 15. But even if the government's argument were improper, it would not supply a basis for reversal, because the trial court instructed the jury that its charge, not the arguments

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[8] The cases cited by petitioner (Pet. 13-14) are not to the contrary. In *Quercia*, 289 U.S. at 468, 472, the court told the jury as a "definite and concrete assertion of fact" that wiping one's hands while testifying as defendant had "is almost always an indication of lying," and the court added that "every single word that man said, except when he agreed with the Government's testimony, was a lie." In *United States* v. *Safley*, 408 F.2d 603, 605 (4th Cir.), cert. denied, 395 U.S. 983 (1969), the court criticized (but found no plain error in) a charge that witnesses "are presumed to speak the truth," because the court believed that the charge diluted the presumption of innocence where the defendant did not testify. In *United States* v. *Dunmore*, 446 F.2d 1214, 1219 (8th Cir. 1971), cert. denied, 404 U.S. 1041 (1972), the court told the jury, inter alia, that the only government witness implicating the defendant "told his story right straight out, answered the questions that were asked him without hesitation, without pulling any punches * * *." The court of appeals found that this statement "came dangerously close to directing a verdict against [the defendant]." *Ibid.*

of counsel, must govern the jury's deliberations. C.A. App. 7923. The court properly charged that "[a]n individual is not held responsible on the basis of an act or omission of * * * a subordinate, unless you are convinced beyond a reasonable doubt that such defendant willfully ordered, directed, or authorized the act." Pet. App. 24a. That instruction prevented petitioner from being convicted merely because he knew of price-fixing activities by others.[9] The record citations offered by petitioner to support his claim that the government argued for "vicarious liability" (Pet. 14) are to arguments of petitioner's own counsel to the court (C.A. App. 8809), not the argument of government counsel to the jury, and to a requested jury instruction (C.A. App. 187) that was never given.

5. Petitioner incorrectly claims (Pet. 17-23) that the prosecution withheld exculpatory information from him that would have cast doubt on the credibility of government witnesses. The defendants knew well before trial that James Sheridan had told the government that the initial conspiratorial meeting between Pollino and Harford in Ocean City occurred in June 1983.[10] Shortly before trial began, however, Sheridan realized that he had incorrectly dated the Ocean City meeting, and that in fact the meeting had occurred a year earlier, in June 1982. Sheridan realized his error when he reviewed a document, Trial Exhibit H-1, that the defendants had not previously turned over to the

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[9] Because the court's jury instructions precluded a conviction on a theory of "vicarious liability," petitioner's reliance on *Stirone* v. *United States*, 361 U.S. 212 (1960) (Pet. 15), is misplaced.

[10] The defendants knew that Harford's business records showed that he was in another city at the time of the June 1983 Ocean City convention and that, although it was not impossible for Harford to have gone to Ocean City for part of the convention, Sheridan's recollection was probably faulty. Compare Pet. 19.

government. Pet. App. 26a.[11] The government disclosed Sheridan's change in recollection in its opening statement on the first day of trial and questioned Sheridan about it on direct examination. C.A. App. 764, 953-954. On cross-examination, the defendants extensively and aggressively questioned Sheridan about his reasons for placing the Ocean City meeting in 1982 rather than 1983. The defendants never requested a continuance to investigate the matter further. Pet. App. 27a; C.A. App. 1185-1187, 1214-1224, 1308-1309, 1632-1647.[12] Thus, petitioner was aware at the outset of the trial that Sheridan had testified to two different dates for the Ocean City meeting; petitioner effectively cross-examined Sheridan concerning his changed recollection and expressly declined to ask for additional time to investigate Sheridan's testimony further. Under these circumstances, petitioner's rights to due process were not violated. See *United States* v. *Bagley*, 473 U.S. 667 (1985); *United States* v. *McPartlin*, 595 F.2d 1321, 1345-1347 (7th Cir.), cert. denied, 444 U.S. 833 (1979).[13]

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[11] Trial Exhibit H-1 was a telephone message taken by petitioner's secretary on June 14, 1982, indicating that Sheridan would call petitioner at home that evening. Because Sheridan rarely called petitioner at home, and because the message was taken on the Monday following the annual Ocean City convention, the notation triggered Sheridan's recollection that the purpose of the call was to report on Pollino's meeting with Harford at the convention.

[12] The district court asked the defendants if they wanted a continuance or a mistrial based on their claimed "surprise" at the change in Sheridan's recollection. The defendants made no such request. C.A. App. 1144, 1191, 3240. Having refused that opportunity, petitioner cannot now complain that he lacked sufficient time to investigate the circumstances of Sheridan's changed testimony or to prepare a defense. Pet. 22-23.

[13] Even if the evidence about Sheridan's change in testimony had

With respect to Pollino's alleged change of recollection, the defendants never made a *Brady* argument in the district court and were therefore foreclosed from raising the argument for the first time on appeal. In any event, petitioner knew before trial that Pollino had initially failed to disclose to the government his meeting with Harford in Ocean City and had initially told the government only about meetings that occurred in 1983.[14] In a letter delivered to defense counsel four months before trial, the government disclosed that, while Pollino had initially denied any price-fixing activities relating to the Baltimore area (a region covered by the conspiracy in this case), in mid-1987, Pollino "indicated that he had participated in price-fixing activities involving

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not been disclosed at trial, there could have been no prejudice to petitioner. The date of the Ocean City meeting and Sheridan's credibility with respect to that date would not have affected the substantial independent evidence of the price-fixing conspiracy and petitioner's involvement in it.

[14] Pollino testified at the related trial of Pepsi's Richmond division manager, Armand Gravely, who was convicted of price-fixing in the Richmond area. *United States* v. *Gravely*, 840 F.2d 1156 (4th Cir. 1988) (see Pet. App. 3a). The indictment in the *Gravely* case was limited to events beginning in 1983 in the Richmond-Norfolk area because Pollino had not yet disclosed to the government the fact that the conspiracy extended to Baltimore and began with the Ocean City meeting in 1982. In this case, the indictment covered Baltimore and events in 1982 because of information learned after the *Gravely* indictment was filed. Petitioner is flatly wrong in claiming, without citation (Pet. 19 (emphasis added)) that "shortly before the indictment in this case was issued, the prosecution was preparing indictments based upon a conspiracy beginning in *1983*." The government knew that Sheridan's recollection was probably faulty when he placed the Ocean City meeting in 1983, because other evidence (admitted at the *Gravely* trial) showed that price-fixing activities occurred in early 1983 and that Pollino placed the Ocean City meeting in 1982.

the Baltimore Division of Allegheny Pepsi; that in 1982 he met with [petitioner] and James P. Sheridan concerning price fixing; that he participated in a price-fixing meeting with James J. Harford in Ocean City, Maryland, in June 1982."[15] Thus, although Pollino had originally failed to disclose his meeting with Harford in 1982, the government revealed Pollino's change in his story well before trial.

Although Pollino consistently stated before and during trial that the Ocean City meeting occurred in 1982 (C.A. App. 2519, 2872), he indicated on cross-examination that he had initially told the government that the Ocean City meeting had occurred in 1983 rather than 1982. C.A. App. 2883.[16] That answer (from a witness the court had termed "recalcitrant" because of his connections to the defense, C.A. App. 2606, 2825) came as a surprise to the government. The defendants, however, never claimed that they were surprised by Pollino's testimony, and they never asked for a continuance to investigate the alleged change in his recollection. Instead, they effectively cross-examined him concerning the matter. Thus, as in the case of Sheridan's change of recollection, the government did not withhold any exculpatory evidence from the defendants at trial.

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[15] Pollino testified at trial that initially he had not wanted to implicate Harford in the conspiracy and that he was just telling the government what they already knew. When he realized that the government was going to get the information from other sources anyway, he decided to tell all he knew. C.A. App. 2876-2880.

[16] Defense counsel tried to show that the reason Pollino changed the year of the meeting was because the government showed him some of Harford's expense reports, which defendants claimed showed that Harford could not have been in Ocean City in June 1983. C.A. App. 2883-2884. Pollino denied that these documents caused him to change his testimony (just as James Sheridan had, see note 11, *supra*). C.A. App. 2884.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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